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No. 10-1068

IN THE

Supreme Court of the United States

ACORN, ACORN INSTITUTE, INC., and MHANY MANAGEMENT, INC., f/k/a/ New York Acorn Housing Company, Inc.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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Second Circuit Holds That Law Barring ACORN From Receiving Federal Funds is Not a Bill of Attainder, 124 HARV. L. REV. 859 (2011) 1-2

1. The Government acknowledges that Congress debarred ACORN and its affiliates from federal contracting and funding because it believed ACORN guilty of mismanagement. The Government supports the court of appeals reasoning that Congress had a legitimate reason to bar funding "in the face of clear evidence of mismanagement" by ACORN. Respondents' Brief in Opposition ["Resp. Br."]. at 13. Yet a touchstone of whether a statute targeting an individual person or organization is a Bill of Attainder is whether Congress has acted based on an implicit or explicit finding of guilt, for, in so acting, Congress oversteps its legitimate legislative role and intrudes on the judicial or administrative function of determining individual guilt.

Where Congress singles out an individual or group for a deprivation based on a determination that it is guilty of misconduct, the judiciary has *always* declared the statute unconstitutional bill of attainder. *United States v. Lovett*, 328 U.S. 303 (1946); *United States v. Brown*, 381 U.S. 437 (1965); *Foretich v. Morgan*, 531 F. 3d. 1198 (D.C. Cir. 2003). In contrast, *only* where a court finds that a statute singling out an individual renders no implied or explicit judgment on the entity's guilt or misconduct has that statute been held not to constitute a Bill of Attainder, despite its selectivity. *Nixon v. Adm'r of General Servs.*, 433 U.S. 425, 472, 475-84 (1977); *BellSouth Corp. v. FCC*, 162 F. 3d 678, 690 (D.C. Cir. 1998); *SBC Commc'n v. FCC*, 154 F. 3d 226,243 (5th Cir. 1998). The court of appeals holding in this case is therefore *unprecedented* and contradicts this Court and Circuit decisions by allowing Congress to single out a specific group for a serious deprivation because Congress believed that group guilty of significant mismanagement or some other misconduct. *See Second Circuit Holds That*

Law Barring ACORN From Receiving Federal Funding is Not A Bill of Attainder, 124 HARV. L REV. 859, 863(2011) ("In holding that the denial of funds was not punitive in this case, the Second Circuit relied on Congress's implicit conclusion that ACORN had committed the acts of fraud and mismanagement of which it was accused, a judgment Congress is not entitled to make.").

The government argues, as did the court of appeals, that Congress could reasonably base its actions here on "clear evidence of mismanagement." Resp. Br. at 13. ACORN, by contrast, while acknowledging that it made some mistakes and that individual employees committed misconduct and were fired, claims that it has been the object of a partisan attack and strongly disputes the allegations of mismanagement and crimes that numerous members of Congress alleged they were guilty of. *See* Pet. App. 35a, 36a. As the District Court noted, the question here is not whether Congress' view of the evidence, or petitioners' response is correct. *Id.* at 35a Rather, the issue is whether Congress is the branch of government empowered to decide whether a specific organization is guilty of mismanagement or other crimes and impose a serious deprivation on that organization. The Bill of Attainder Clause stands for the proposition that it is not.

If Congress can debar ACORN, it can debar other corporations which it believes have been negligent, guilty of mismanagement, misused government funds, or other crimes. The serious problems such congressional statutes present led the American Bar Association to oppose legislation of this type. *See* American Bar Association, *Resolution 116*, REPORT TO THE HOUSE OF DELEGATES (2010), *available at* http://www2.

americanbar.org/SiteCollectionDocuments/116.pdf; Pet. at 4. If the Second Circuit's reasoning is correct, Congress could also decide that there is "clear evidence" that a particular executive or judicial administrative employee has committed misconduct and suspend or fire the employee using its appropriation power. In our system of government, those tasks historically have been assigned to administrative agencies or the judiciary. This Court should not permit Congress to start performing judicial, administrative or executive functions that it has never performed before.

2. The government argues against a straw man, responding to an argument that petitioners have not made – namely that the Constitution prohibits Congress from legislating against a specific individual or group. Resp. Br. at 13-14. Petitioners – and the District Court – recognize that Congress *can* legislate by singling out a specific individual or group for some deprivation, but only where it can show a non-punitive reason to *single out* that group for differing treatment that does not reflect a judgment of guilt. This Court in *Nixon* relied on just such a non-punitive rationale to find no Bill of Attainder violation, as did the circuit courts in the *Bell Operating Companies* cases. Pet. at 18-19. In *Foretich*, the D.C. Circuit held that the government had not articulated a non-punitive rationale explaining the differential treatment given one individual, and thus declared the statute at issue unconstitutional. Pet. at 16.[1]

1. The government correctly notes that the *Foretich* court rejected the notion that specificity alone is sufficient to render a statute a Bill of Attainder, and that the principal touchstone of a bill of attainder is punishment, but it fails to acknowledge that in *Foretich*, the court clearly held that the specificity of a statute was

The government's test essentially nullifies the Bill of Attainder Clause and contradicts *Lovett* and *Brown*. For so long as Congress is not acting irrationally – some evidence exists that a particular individual or organization is doing something wrong – the court of appeals rationale would permit Congress to take measures pursuant to its appropriation powers (or other enumerated powers) to ensure that the person or group not be in a position to continue the wrongdoing. Under the government's rationale, Congress should be able to prohibit specific individuals or organizations from holding union positions if it has "clear" evidence that person has provoked illegal political strikes, deprive a father of child custody so long as it reasonably believes that the father is a child abuser, or deprive a government employee of a government job (or as in *Lovett*, funding for a government position) if it has reason to believe that the government employee is subversive, a traitor or has committed fraud. However, such statutes would be inconsistent with this Court's Bill of Attainder jurisprudence.

3. The government repeats the court of appeals' error in arguing that petitioners "are not prohibited from any activities; they are only prohibited from receiving federal funds to continue their activities." Resp. Br. at 12. Petitioners' contracts were terminated – thus they could not "continue their activities". Contractors who repair government buildings or federal highways cannot "continue their activities" once their contracts are terminated and they are barred from new contracts.

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relevant to the punishment inquiry, and required the government to articulate a non-punitive rationale which would explain the singling out of an individual, which in that case – as here – the government was unable to provide. Pet. at 16.

Government employees such as Lovett cannot continue their activities if forbidden from receiving any appropriations for government work, and groups such as petitioners that work on government financed mortgage counseling or other government programs cannot "continue their activities" once their contracts are terminated and they are barred from bidding on new contracts.

It is true that petitioners can continue to seek other, non-governmental funding (although in this case the statutes at issue made even that very difficult, *see* Pet. App. at 68a-69a), just as Lovett could have sought a non-governmental job. But the argument that a statute is not a Bill of Attainder because it only denies petitioners appropriations and doesn't banish them from a profession was explicitly rejected in *Lovett*. The *Lovett* Court stated that, "we do not agree with counsel for Congress that the section did not provide for the dismissal of respondents, but merely forbade government agencies to compensate them for their work... This permanent proscription from the opportunity to serve the government is punishment, and of a most severe type." *United States v. Lovett*, 328 U.S. 303, 313,316 (1946). Here, petitioners have also been proscribed "from the opportunity to serve the government" through government contracts or awards. The bar is effectively permanent, in that it has been renewed continuously over the past few years, appears likely to be continued by Congress again and is already included in the government's proposed budget for FY 2012,[2] and, as the

2. Office of Management and Budget, Executive Office of the President of the United States, *Proposed Budget of the United States, Fiscal Year 2012* 221,315,701,967,1064 (2011), available at http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/appendix.pdf.

District Court noted, an annually renewed Congressional ban that could not be challenged until made permanent would permit Congress to effectively permanently ban a disfavored corporation. Pet. App. 55a. Moreover, even if the ban were only to last two years, such a bar is generally recognized to have "harsh" consequences and is a "very serious matter" for government contractors. *See* Pet. at 30 (citing cases).

4. The government argues that even if these statutes are overbroad and "less burdensome alternatives" existed, "a law is not a bill of attainder if it is not punitive and here... the law is not punitive." Resp. Br. at 18. This argument is circular, because the point of looking at whether the statute is clearly overbroad is because such overbreadth serves as evidence that punishment is afoot. *Nixon*, 433 U.S. at 482. Just as punishment was historically imposed on vanquished opponents by not only banishing or beheading them, but also by imposing deprivations on their allies or relatives, *see* Pet. at 21-22 n. 27, so too an objective indicator of punishment today is whether the statute is far broader than necessary to serve the non-punitive rationale that Congress asserts.

The government claims, as did the court of appeals, that it is not overbroad and punitive to debar a corporation such as petitioner MHANY for which, indisputably, no evidence of misconduct or mismanagement exists, because of the "*complex structure* of the "ACORN Family" and the fact that money is fungible." Resp. Brief at 15, 18-19 ("ACORN's *complex structure* gave Congress a valid reason to include ACORN's subsidiaries and affiliates in the restriction...")(emphasis added). But the government does not explain why the "complex structure" of "the formally separate entities that together constitute

the ACORN Family," *id.* at 2, justifies disregarding petitioners separate corporate identity here. Typically, the corporate form is respected absent evidence that the corporate form is being misused, or that money is being diverted from one company to another, or that the related corporation has participated in the target corporation's misconduct, or that all are part of a criminal scheme, as Congress concluded in the terrorism or racketeering "family" context.. The only plausible explanation for the "allied" organizations debarment that ensnared petitioners MHANY and ACORN INSTITUTE ("AI") was provided by the Congressional "Issa" report that inspired these statutes and was relied on by their Senate sponsor,– namely that these separately incorporated corporations were part of a shell game and a criminal enterprise designed to defraud the government. That rationale, however, is clearly punitive, and therefore the government does not rely on it – but instead uses the term "complex structure," which it does not define or explain, but which must be a code term for "complex and illegitimate structure" in order to justify this statute.

5. The government claims that Congress had a legitimate reason to decide that ACORN and all its affiliates must be immediately defunded, rather than "rely on the Executive Branch's slower and less certain administrative procedures." Resp. Br. at 16. The government's suggestion that Congress is the swift moving body and that Executive branch procedures are "slower" is certainly unusual. In any event, the administrative process for suspending and debarring federal contractors is designed to respond quickly to allegations of serious misconduct, and Congress has not thus far believed that the administrative process needs to be amended to speed it up to address allegations of fraud or mismanagement, nor is legislation currently

pending to address the government's newly discovered concern for the slowness of the process.

The administrative procedures are "less certain," in that they accord the affected corporations some modicum of due process before suspension and debarment. However, as this Court has noted, the Bill of Attainder Clause was designed to prevent Congress from becoming a "lynch mob," rushing to judgment based on inflamed popular sentiment, and thus it is precisely legislative circumvention of the "less certain" due process procedures utilized by the judiciary or modern day administrative agencies that the Bill of Attainder Clause protects against.

6. The government notes that ACORN only obtained 10% of its funding from government sources, and therefore the statutes did not threaten ACORN's very existence. Resp. Br. at 9. Aside from the fact that petitioner AI received a far greater percentage of its funding from the government, the court of appeals and the government ignore the district court's undisputed factual finding that the funding ban - which applies not only to ACORN but any undefined allied group - "has also affected ACORN's ability to obtain funding from non-governmental entities fearful of being tainted – because of the legislation – as an affiliate of ACORN." Pet. App. 68a-69a

7. The government also claims that review is unwarranted here because "in the posture of this case," resolution of the Bill of Attainder question "may well not matter." Resp. Br. at 20 However, the government does not argue that petitioners' claims are now moot, but, rather, that they might become moot in the future for several reasons, none of which is convincing.

First, the government argues that Congress might not re-enact the ACORN defunding ban for FY 2012, even though Congress has extended the ban numerous times already in both continuing appropriations resolutions and annual appropriation acts, has done so the last few times without opposition, and the ban is included in the President's proposed budget for FY 2012.[3] Yet, even if Congress does not re-extend the ban for next year, or extends it in some slightly different form, petitioners' claims would not be moot for several reasons.

Accepting the government's argument would mean that ACORN could never obtain review of an indefinite, year to year appropriations ban, because the government could always make the same argument it makes now - that the ban might shortly expire and therefore review is unwarranted. As the District Court noted, this situation presents the "capable of repetition but evading review" problem that this Court has held is an exception to the mootness doctrine. Pet. App. 55a. Moreover, petitioner MHANY has a live current controversy even if Congress determines not to extend the ban. The Congressional ban has significantly damaged MHANY's reputation and has caused several major New York banks with whom it had important relationships prior to the ban's enactment to avoid the organization, which has in turn deprived MHANY of funding needed to run many of its service programs and financing for some of its affordable housing developments. That reputational injury, with its important economic component, continues even if petitioners were no longer precluded from receiving federal contracts. Pet. App. 67a-69a, 71a fn. 12; *Foretich*, *supra*, at 1216.

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3. *See* fn 2, *supra*.

Second, the government asserts that since two of the petitioners have now filed for bankruptcy, and MHANY was declared by HUD not to be an allied organization of ACORN after the oral argument in the Second Circuit (during which counsel for the government was pressed by the court to state its position on whether MHANY was an allied organization), their claims may be moot irrespective of whether Congress reenacts the ban. However, the Trustee and Bankruptcy Court have authorized petitioners' counsel to seek relief in this Court, and, as stated above, MHANY continues to suffer real and ongoing reputational and economic injuries as a result of the funding ban, notwithstanding HUD's decision. In addition, HUD's voluntary change of position during the course of this litigation does not moot MHANY's claims, so long as the statutory bar continues. *See* Pet. at 2 fn 1.

Finally, the government suggests that the Court wait to see what happens on remand, because the petitioners might succeed on one of their other constitutional claims. But if the lower courts declared these statutes unconstitutional for either First Amendment or Due Process reasons, the government would undoubtedly seek and obtain review in this Court. Then the Court would be faced not only with the important and potentially dispositive Bill of Attainder question that the case presents at this posture, but also complex Due Process and First Amendment issues which at this point need not be resolved.

This case presents important Bill of Attainder issues in which the Second Circuit opinion is at odds with a decision of the D.C. Circuit. The case affords this Court the opportunity to clarify the law in an important, albeit

seldomly-litigated area. The best time for this Court to decide these issues is now, not some indefinite time in the future. The facts here are not in dispute, the case was decided on cross motions for summary judgment, and therefore there is no reason to wait for a more developed record. Judicial economy will be furthered if this Court now decides the potentially dispositive Bill of Attainder issue, as opposed to requiring the lower courts, and ultimately possibly this Court to grapple with complex, and potentially fact-dependent, First Amendment and Due Process questions which may well be unnecessary to resolve.

CONCLUSION

For all of the above reasons, petitioners urge this Court to grant review in this case.

Dated: New York, New York
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Respectfully Submitted,

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